FILED
OCT 28 1948
CHARLES ELMORE CROPLEY
CLERK

No. 370

Supreme Court of the United States

OCTOBER TERM, 1948

SOUTHWESTERN GREYHOUND LINES, INC., a Corporation, MID-CONTINENT COACHES, INC., a Corporation, and SOUTHWESTERN MOTOR CARRIERS CORPORATION, a Corporation d/b/a SOUTHWESTERN TRAILWAYS,
Petitioners,
VERSUS
LEO F. KING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches Inc., a corporation and Southwestern Motor Carriers Corporation, a corporation dba Southwestern Trailways, Petitioners,
By EARL PRUET,
First National Building,
Oklahoma City, Oklahoma,
Their Attorney.

Of Counsel:
DRAPER GREGORY,
JOHN F. EBERLE,
First National Building,
Oklahoma City, Oklahoma.

October, 1948.

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No. ———

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OCTOBER TERM, 1948.

SOUTHWESTERN GREYHOUND LINES, INC., a Corporation, MID-CONTINENT COACHES, INC., a Corporation, and SOUTHWESTERN MOTOR CARRIERS CORPORATION, a Corporation d/b/a SOUTHWESTERN TRAILWAYS,
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VERSUS

LEO F. KING,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches, Inc., a corporation, and Southwestern Motor Carriers Corporation, a corporation d/b/a Southwestern Trailways, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered the 6th day of August, 1948.

OPINION BELOW

The opinion sought to be reviewed is Leo F. King v. Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches, Inc., a corporation, and Southwestern Motor Carriers Corporation, a corporation, d/b/a Southwestern Trailways in the record herein, pages 19 to 23, inclusive. The order of the District Court sustaining the motion to dismiss is likewise in the record herein, page 14.

JURISDICTION

This Court has jurisdiction to review said judgment under Section 240 of the Judicial Code (28 USCA, Sec. 347, Title 28, USCA 1254).

QUESTION PRESENTED

Whether under the written contract attached to the Amendment to the Complaint, marked "Exhibit A," the status of the respondent was that of an independent contractor, or did he hold a "Position in the Employ" of the petitioners within the provisions of Selec-

tive Training and Service Act of 1940, Section 308, Title 50 App. USCA. The parts of the Act applicable[1]

SUMMARY STATEMENT OF THE MATTER INVOLVED

The substance of the terms of the written contract are set out in the opinion of the Circuit Court of Appeals (R. 19-23, incl.).

---

1. "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training or from hospitalization continuing after discharge for a period of not more than one year—

* * * * * *

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during the period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any case and shall advance it on the calendar * * *."

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Tenth Circuit is in direct conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in the case of *Brown* v. *Luster et al.*, 165 Fed. (2d) 181.

2. The Circuit Court of Appeals for the Tenth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

3. The Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

SUPPORTING BRIEF

First.

The decision in this case is contrary to that in *Brown* v. *Luster et al.*, 165 Fed. (2d) 181.

In that case, under the facts, the Court applied the rule announced in the cases of *United States* v. *Silk et al.*, and *Harrison* v. *Grey Van Lines, Inc.*, 331 U. S. 704, 67 Sup. Ct. 1463, and in the opinion the Court discussed Section 308 of 50 U. S. C. A. That Court held that Brown, a commission salesman for M. R. Luster and A. M. Luster doing business as Sunbeam Furniture Company was an independent contractor and did not hold a "position in the employ" of the respondents within the provisions of the Act.

In the opinion of the Circuit Court of Appeals for the Tenth Circuit in the instant case, the court reversed the District Court's order sustaining petitioners' motion to dismiss upon the control given petitioners over the respondent in the contract as to the details in the operation of the depot.

Petitioners are common carriers of passengers for hire, and they are governed by both statutes and the rules and regulations of the Interstate Commerce Commission. The control granted the petitioners in the contract is nothing more than petitioners seeking to comply with the laws and regulations promulgated for the benefit of the Public,[2] through their independent contractor. The contract is silent as to the right of the petitioners to exercise any control in the physical details of operation of the station.

Second.

The decision of the Circuit Court of Appeals for the Tenth Circuit is in conflict with the decisions of the Supreme Court of Oklahoma.

—*White* v. *McGee*, 11 Pac. (2d) 924;

Cities Service Oil Co. et al. v. *Kindt*, 190 Pac. (2d) 1007;

Bokoshe Smokeless Coal Company v. *Moorehead*, 126 Pac. 1033;

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Butcher Packing Company v. *Hixon*, 119 Pac. (2d) 1109;

2. Motor Carrier Act, Title 49 USCA, Sections 316 and 317.

Sawin et al. v. *Pease*, 97 Pac. (2d) 27;

Bradley v. *Chickasha Cotton Oil Company*, 84 Pac. (2d) 629.

Third.

The decision of the Circuit Court of Appeals for the Tenth Circuit in the instant case is in direct conflict with the decisions of this Court in the cases of *United States, Petitioner,* v. *Silk et al.*, and *Harrison* v. *Grey Van Lines, Inc.*, 331 U. S. 704, 67 Sup. Ct. 1463.

It is respectfully submitted that a Writ of Certiorari should be granted.

Southwestern Greyhound Lines, Inc., a corporation, Mid Continent Coaches Inc., a corporation and Southwestern Motor Carriers Corporation, a corporation dba Southwestern Trailways, Petitioners,

By EARL PRUET,
First National Building,
Oklahoma City, Oklahoma,

Their Attorney.

Of Counsel:
DRAPER GRIGSBY,
JOHN F. EBERLE,
First National Building,
Oklahoma City, Oklahoma.

October, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 370

SOUTHWESTERN GREYHOUND LINES, INC., a Corporation, MID-CONTINENT COACHES, INC., a Corporation, and SOUTHWESTERN MOTOR CARRIERS CORPORATION, a Corporation d/b/a SOUTHWESTERN TRAILWAYS, PETITIONERS

v.

LEO F. KING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion (R. 14). The opinion of the Court of Appeals (R. 19-23) is reported at 169 F. 2d 497.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1948 (R. 24). A petition for a writ of certiorari was filed on October 28, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether respondent occupied a position "in the employ of an employer," within the meaning of Section 8 of the Selective Training and Service Act of 1940, at the time of his induction into military service.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 308) provide as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate,

(2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

STATEMENT

Respondent acted as depot or station agent for petitioners in the City of El Paso, Oklahoma, until shortly before his induction into military service on August 14, 1943 (R. 2). Upon his discharge from the armed forces on December 6, 1945, respondent demanded and was refused restoration to the position which he left or one of like seniority, status and pay (R. 3). This action was brought on October 30, 1946, to compel such restoration or, in the alternative, for an appropriate money judgment (R. 3-4). Petitioners' motion to dismiss the complaint (R. 13-14) was granted on the ground that respondent was an independent contractor

(R. 14). The judgment of the district court was reversed by the court below and the cause remanded for further proceedings (R. 24).

Petitioners, as motor carriers of passengers and property for hire, maintained a depot or station in the City of El Reno, Oklahoma (R. 2, 6). The agreement pursuant to which respondent undertook to act as station agent for petitioners or their predecessors is attached as an exhibit to the amended complaint (R. 2, 4, 5-13). This agreement required respondent to perform the customary duties of station agent, such as selling tickets at tariffs fixed by the carriers, furnishing information to the public, and handling baggage, express and mail for the carriers (R. 7). He was also required to provide and maintain suitable waiting room and toilet facilities (R. 7). He agreed not to sell tickets or render services for any competing carriers or permit them the use of the depot facilities without the permission of petitioners (R. 7).

Respondent was required to render reports of sales and remit funds in accordance with written instructions (R. 8). He was obligated to permit the carriers' representatives, at any time during reasonable hours, to inspect and check all the carriers' property and to inspect and audit all records and accounts maintained by respondent relating to the carriers' business (R. 8). He agreed to file and maintain all tariffs, time schedules, fold-

ers and bulletins furnished him by the carriers and to supply the public with complete and accurate information in accordance with this material (R. 8). He was also required to pay various utility bills and to assume liability for designated claims and losses occasioned by failure to fulfill his obligations under the contract and by other causes (R. 6, 7-8, 8, 9, 12). Compensation for respondent's services was a fixed percentage of ticket sales and express transportation charges (R. 10).

Respondent was required to maintain signs designating the premises as a motor coach stop for petitioners' lines (R. 9). Title to all tickets and their proceeds remained in the carriers at all times as did title to all station equipment, signs, and other material furnished to the station agent by the carriers (R. 9). The lease for the depot premises was held by petitioners (R. 6). Although the carriers were authorized to deduct from respondent's commissions a rental value for the use of the depot (R. 6), respondent agreed not to sublease any space in the bus terminal building for any purpose without obtaining the written consent of the carriers (R. 9).

The agreement extended for an original period of 30 days and from month to month thereafter, subject to termination on 10 days' notice by either party (R. 11). It provided that respondent was an independent contractor, and not a beneficiary within the meaning of any workmen's compensa-

tion law, "who agrees to limit his activities, in consummation of the herein specified results, to said premises" (R. 11).

The Court of Appeals held that the contract's designation of respondent as an independent contractor did not determine the question but that "the effect of the contract on the parties * * * controls their relationship" (R. 22). After describing with particularity the various specific duties which the contract imposed on respondent, the court concluded that the contract created an employer-employee relationship. "It is inconceivable," the court stated, "how more completely the Companies could control the details of the operation of the Depot * * *. * * * We think that when, as here, one undertakes by contract to control every detail of a business he should not be heard to say that those who perform the details are not his servants" (R. 23).

ARGUMENT

This case turns upon its own facts and does not present any question of general importance under the Selective Training and Service Act of 1940. It is not shown that the particular contract involved has application beyond the single situation here in issue. The determination that its provisions create an employment relationship, therefore, does not warrant review by this Court.

Review is unnecessary for the further reason that the court below correctly applied the prin-

ciples established in recent decisions of this Court. *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722; *United States* v. *Silk*, 331 U. S. 704; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. The purposes of the Selective Training and Service Act of 1940 (*Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, 285) would seem to require an approach to the scope of "a position * * * in the employ of an employer" similar to that adopted in interpreting the term "employee" in the legislation involved in the above cases. It is clear that the contractual characterization of the status of the parties does not determine their legal relationship. *Rutherford Food Corp.* v *McComb*, *supra*; *Bartels* v. *Birmingham*, 332 U. S. 126. The determination of the relationship does not depend upon any single characteristic or on any "isolated factors but rather upon the circumstances of the whole activity" (*Rutherford Food Corp.* v. *McComb*, *supra* at 730), upon "the total situation" (*United States* v. *Silk*, 331 U. S. *supra* at 719).

The primary factors which the Court in the *Rutherford* and *Silk* opinions considered significant, although no single factor was considered controlling, were (1) the extent to which the services in question are an integral part of the "employer's" business, (2) the amount of the so-called "contractor's" investment in facilities and equipment, (3) the nature and degree of control by the principal, (4) the opportunities for profit or loss,

and (5) the amount of initiative, judgment or foresight required for the success of the claimed independent enterprise. In the instant case it is apparent that the maintenance of a bus depot is an integral part of the carriers' business and that petitioners' control extends to virtually every detail of respondent's activity. To the extent that the complaint and the contract permit an evaluation of the other significant factors, they also point to an employment relationship. The court below was clearly correct, therefore, in reversing the district court's judgment, on a motion to dismiss, holding respondent to be an independent contractor.

Petitioners' suggestion of a conflict with the decisions of the Supreme Court of Oklahoma and of the Ninth Circuit is without merit. Wholly apart from the fact that the Oklahoma state court decisions involve different work relationships and are not necessarily inconsistent with the decision below, they are without relevance since determination of the relationship here is "a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.'" *United States* v. *Silk,* 331 U. S. at 713; *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. at 123, 121-124. The facts of *Brown* v. *Luster,* 165 F. 2d 181 (C. C. A. 9), relied upon by petitioners, bear no resemblance to those presented here. The *Brown* case involved a furniture sales-

man in an assigned territory who was free to solicit orders at his pleasure for the company in question and for other companies as well.

CONCLUSION

No question of general importance is presented, there is no conflict, and the court below properly applied the principles of recent decisions of this Court. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON LIFTIN,
Attorneys.

DECEMBER, 1948.

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